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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-817

JOSEPH GAMBINO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 23, 1973

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The petitioner Joseph Gambino respectfully prays that a writ of certiorari issue to review the judgment entered in this proceeding on September 26, 1973, by the United States Court of Appeals for the Second Circuit.

OPINION BELOW

No opinion was rendered by the Second Circuit. On the appeal, the judgment of conviction entered by the United States District Court for the Southern District of New York was affirmed in open court immediately following the oral argument on September 26, 1973. The judgment of affirmance is reported at 483 F.2d 1399 and is reprinted in the appendix hereto. No opinion was rendered by the District Court.

JURISDICTION

The Second Circuit on September 26, 1973, affirmed a judgment of conviction entered on April 17, 1973, in the Southern District of New York. The petitioner had been convicted, after a jury trial, of having falsely represented to an F.B.I. agent that he was a citizen of the United States, in violation of 18 U.S.C. § 911.

On timely application, Mr. Justice Marshall on October 23, 1973, signed an order extending the time for filing this petition for certiorari to and including November 24, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an alien is denied his right to a fair trial under the Fifth Amendment when the Government without explanation delays for about five years indicting and trying the alien, who had difficulties with the English language, on charges that he falsely represented in English that he was an American citizen.

2. Whether an alien, convicted of having falsely represented that he was a citizen while conversing in English with an F.B.I. agent in 1967, is entitled to a new trial under Rule 33, Fed. Rules Crim. Proc., on evidence that (a) the 1967 conversation had been overheard by a third person, a fact unknown at the time of trial, (b) the third person's version of the conversation fully supported the alien's claim of language difficulties, and (c) recently uncovered Government tapes of contemporaneous immigration hearings also supported the claim of language difficulties.

STATUTE AND RULE INVOLVED

Section 911, Title 18, United States Code:

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned no more than three years, or both.

Rule 33, Federal Rules of Criminal Procedure:

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. . . .

STATEMENT OF THE CASE

A. The proceedings below

On June 1, 1972, the petitioner was indicted in one count for a violation of 18 U.S.C. § 911. The indictment read in full as follows:

> On or about the 8th day of June 8, 1967 in the Southern District of New York, JOSEPH GAMBINO, the defendant, unlawfully, wilfully, knowingly and falsely represented himself to be a citizen of the United States, in that in the course of an official interview of said defendant conducted by Special Agent Edwin C. Taylor, Federal Bureau of Investigation, the defendant falsely stated that he had become a citizen of the United States in 1960, whereas in truth and in fact, as the defendant then and there well knew, he was not then and had never previously become a citizen of the United States.

It is thus apparent that the indictment was returned about seven days before the five-year limitations period expired.[1] That fact led to the filing of a pre-trial motion to dismiss the indictment, wherein petitioner alleged "that the hiatus between the crime alleged and the filing of the Indictment violated his rights under the Fifth and Sixth Amendments to the Constitution of the United States and has rendered a fair trial impossible." An evidentiary hearing was requested so that petitioner might be accorded an opportunity to demonstrate that "actual prejudice" had resulted from "this inordinate delay." This motion to dismiss the indictment was denied by the District Court and the denial was affirmed on the appeal to the Second Circuit.

A four-day jury trial took place in January and February of 1973. Petitioner was found guilty as charged. On April 17, 1973, he was given a one year suspended sentence and fined $750. The judgment of conviction was affirmed by the Second Circuit on the appeal.

Also affirmed by the Second Circuit was the denial by the District Court of petitioner's motion for a new trial on grounds of newly discovered evidence. That motion had been filed on the date of sentencing pursuant to Rule 33 of the Federal Rules of Criminal

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[1] In non-capital cases, "no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282.

Here, the trial evidence showed that the alleged offense occurred on June 7, 1967, while the indictment was returned on June 1, 1972. It is apparent from the record that the Government became aware of petitioner's false statement about six months to a year after the June 1967 interview by the F.B.I. agent.

Procedure. One of the allegations in that motion was that only after the trial was it discovered that one of petitioner's fellow employees had been present at the June 7, 1967, interview between petitioner and the F.B.I. agent and had overheard the entire conversation. The accompanying affidavit of that individual stated that petitioner at that time had extreme difficulty speaking and understanding the English language. It was also alleged that recently uncovered tapes of a contemporaneous immigration hearing supported the claim as to petitioner's 1967 language difficulties.

B. The evidence at trial

The Government's main witness at the trial was Special Agent Edwin Taylor of the F.B.I. He testified that he had interviewed the petitioner Gambino on June 7, 1967, in connection with an F.B.I. investigation into private garbage collection in Westchester County, New York. Petitioner at that time was employed as a manager of a garbage transfer station.

Taylor testified that he had asked petitioner various questions about his job and his personal background. He claimed that petitioner's responses included statements that he was born on December 24, 1932, in Palermo, Sicily, that he entered the United States in 1954, and that he became a United States citizen in 1960. Tr. 53.

The prosecution and the defense joined in offering into evidence Taylor's typewritten report of his interview, the report having been dictated on June 9, 1967. The report stated:

> Joseph Gambino, also named Giuseppe Gambino, advised he manages the garbage transfer station at Mount Vernon, New York, for James

Plastina, who presently is in poor health. He advised he is frequently assisted on a gratuitous basis by Donato Limitone, operator of Bronx River Haulage. He said he maintains his present position primarily through a longtime friendship and association with Plastina, having assisted him as a bulldozer operator when Plastina operated a dumping area in the vicinity of Gun Hill Road in the Bronx, a few years ago.

Gambino stated he receives a salary of $210.00 a week from Plastina and many times put in a total of 13 hours a day.

Gambino furnished the following information concerning himself:

He was born December 24, 1932, Palermo, Sicily, and came to the United States through New York City, in 1954. He became a citizen in 1960. He presently resides at 331 First Street, Yonkers, New York (same address as Bronx River Haulage). He is married to Francis Gambino, nee Costello, whose family is deceased, but originally came from Yonkers. Her father's name was Angelo Costello. He has no children and has no relatives in the United States.

He leads a quiet life and is home every evening. He has no hangouts or places he frequents. He has never been arrested.

Taylor further testified that his conversation with the petitioner during this interview was entirely in English, that he had no difficulty understanding petitioner, and that petitioner never indicated any difficulty in understanding him. Taylor also stated that the petitioner spoke "very good English" with a "slight Italian accent." Tr. 58. The Government also offered, in establishing petitioner's ability to speak English, written transcripts of petitioner's statements

in English to the Immigration and Natunalization Sesvice made some three months after the June 1967 interview with Taylor. But no tapes of those hearings were offered.

The prosecution and the defense thereupon stipulated to the critical fact that the petitioner was not then, and has never been, a citizen of the United States either through birth or naturalization. Petitioner's contrary statement to Taylor that he was in fact a naturalized citizen constituted the crime charged in the indictment. In addition, though not relevant to the charge, the evidence showed that various other misstatements had been conveyed by petitioner during the interview: (1) petitioner was in fact born on January 20, 1930, rather than on December 24, 1932, as stated to Taylor; (2) petitioner was not married at the time of the interview, but was in fact married some eight days later; (3) petitioner entered the United States through Norfolk, Virginia, rather than through New York City; and (4) petitioner did have, contrary to his statement to Taylor, relatives living in the United States.

The crux of petitioner's defense at the trial was that he had difficulty understanding and speaking the English language and that he did not willfully make any of the foregoing false statements. The petitioner took the stand and testified that he had not knowingly told Taylor that he was a United States citizen; and he denied giving Taylor a false birth date, or telling Taylor he was married, or telling Taylor that he entered the United States through New York City, or telling Taylor that he had no relatives in this country. Tr. 257, 276, 277.

Various defense witnesses, including petitioner's immigration attorney, testified at length about petitioner's difficulties with the English language. He was said to have particular difficulty with verbal tenses, and questions put to him had to be short and in simple language. Tr. 202. The defense also offered in evidence tape recordings of petitioner's English testimony at a June 1970 immigration hearing, which showed his difficulties with the English language. Tr. 158-197.[2]

In charging the jury, the court stated that, to find the petitioner guilty of a violation of 18 U.S.C. § 911, four elements had to be found proved beyond a reasonable doubt: (1) that on the date in question the petitioner was interviewed by Taylor, who had a right to inquire as to petitioner's citizenship; (2) that during that interview the petitioner told Taylor that he was a citizen of the United States; (3) that the petitioner was not then a citizen of the United States; and (4) that the petitioner made the false statement "willfully and deliberately." Tr. 364-365. Nothing was said in the charge, however, about petitioner's claim or evidence relative to his difficulties with the English language.

The jury found the petitioner guilty as charged. In so doing, the jury obviously believed the Government evidence that petitioner sufficiently understood

[2] At one of the various immigration hearings, held on February 27, 1969, petitioner's use of English was so bad that the Special Inquiry Officer said: "Gentlemen: At this point, I think it might be advisable to use the services of an official interpreter in the Italian language for purposes of clarity. Although I believe the respondent understands the questions that are being asked of him, his responses may create some difficulty in the event the record is to be transcribed and reviewed."

the English language to be able to make a willful false statement to Taylor regarding his American citizenship. Just as obviously, the jury rejected the defense testimony that the purported question and answer regarding citizenship were so overlaid with petitioner's misunderstanding of the English language as to deprive the false answer of any willfulness.

C. The new trial motion

The motion for a new trial, filed under Rule 33 and denied on the date of sentencing, claimed that there was newly discovered evidence of three varieties:

(1) Prospective testimony by one Carlo Conti. In an attached affidavit, Conti claimed that he had worked alongside petitioner for twelve years and had found it "extremely difficult" to speak to petitioner in English without groping for words and rephrasing sentences in the most elementary manner. More importantly, Conti alleged that:

> 3. On June 8, 1967, while we were working, repairing a truck, a man came to speak to Joe. I was working a few feet from the place where they spoke and heard the entire conversation. The man identified himself as F.B.I. Agent Ed Taylor. He only stayed long enough to ask Joe for his name, his address and what his job was. Joe had difficulty understanding what the man was asking and it took several minutes for Agent Taylor to elicit even three simple responses.
>
> 4. Although I recently heard that Joe had been the defendant in a trial, it was not until several weeks after the completion of the trial that I told Joe that I had overheard the conversation.
>
> 5. During the many years I have been acquainted with Joseph Gambino, I have found him

> to be extremely honest and truthful and have never heard it said that he was otherwise.

(2) Prospective testimony by one Frank Garofolo. In an accompanying affidavit, Garofolo stated that he had been a neighbor of petitioner for ten years past and knew him well. In the words of the affidavit,

> 4. Joe has never been able to speak English with any fluency at all. His accent is very heavy and always made it difficult for me and others to understand what he was saying and, of course, it is extremely difficult for him to understand us. Usually, when we spoke, it would be in Italian, as speaking in English was almost impossible. Even today when I speak with Joe, most of our conversations are in Italian. . . . Despite the fact that he could barely speak or understand English, he is a man greatly respected and trusted in the community, both for his honesty and sincerity.

(3) The failure of the Government to produce tapes of the 1967 immigration hearings, held soon after the F.B.I. interview, the written transcripts of the hearings having been introduced by the Government to show that petitioner understood and spoke English with little difficulty. In an accompanying affidavit, petitioner's newly substituted counsel alleged that, contrary to the Government's trial testimony, tape recordings had been made of these hearings, and that the Government had not at any time produced such recordings despite a request therefor. Having obtained and listened to the tapes, counsel stated in his affidavit that

> . . . the transcripts do not contain what actually occurred. The transcripts are deficient in the following ways:

5. First, they fail to show the heavy accent with which the defendant speaks. Second, they fail to show the great hesitation between question and answer. Third, they often rephrase into proper English what the defendant says. The tapes themselves are deficient in that the Hearing Officer shuts off the machine whenever a question is being explained to the defendant, either in English or in Italian. Therefore, the tape of the hearing only contains the questions and the final answer, completely overlooking any explanation or help that the defendant might require.

6. In reading the trial transcript, it is clear that much of the Government's case was based on testimony which showed that the defendant could easily understand English and spoke it with little difficulty. Had these tapes been made available to the defendant or his attorney or had the Government even given notice that these tapes existed, it is my belief that the charge against the defendant would have been dismissed. The tapes clearly indicate that the defendant does not speak nor understand English in any meaningful way.

REASONS FOR GRANTING THE WRIT

The grant of certiorari is here appropriate not alone because of the intrinsic importance of the questions presented. A grant is also appropriate because those questions arise in the context of a unique and potentially discriminatory kind of prosecution. Unless the legal concepts embodied in the questions are carefully assessed in the light of their use to secure the conviction of this petitioner, a most dangerous and discriminatory precedent may have been set by the judgment below.

At the heart of this case is the short but virtually limitless proscription of 18 U.S.C. § 911. That statute visits a felony conviction on any alien who "falsely and willfully represents himself to be a citizen of the United States." It matters not what the purpose, the circumstance or the impact of the false representations may be.[3] It is enough if the representation be found false and deliberately made. As this case illustrates, it thus becomes possible to impose imprisonment or a fine or possibly even a resulting deportation upon a confused alien who makes a false and willful representation solely because his foreign origin makes it difficult to communicate accurately in the English language.

This potential of applying § 911 so as to discriminate against inarticulate aliens, a potential that may well have become a reality in this case, overlaps the questions herein presented and augments the appropriateness of granting review of those questions.

1. An important question is raised as to whether the pre-indictment delay caused substantial prejudice to petitioner's right to a fair trial.

This case raises an important aspect of the problem reserved by this Court in *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971):

> . . . the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-

[3] Section 911, which is a 1940 recodification, omits the requirement in the predecessor statute, 8 U.S.C. § 746 (1940 ed.), that the false representation as to citizenship be uttered "for any fraudulent purpose whatever." Under § 911, it is enough that the representation is voluntarily and deliberately made. *Chow Bing Kew* v. *United States*, 248 F.2d 466, 469 (9th Cir. 1957).

> indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused . . . However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

The instant case provides the opportunity for rendering one of such "delicate judgments" that will illuminate the path for measuring the prejudicial impact of pre-indictment delays on the right to a fair trial. Here the indictment was returned one week before the expiration of the five-year statute of limitations,[4] a fact which may dilute any speedy trial claims under the Sixth Amendment. *United States* v. *Ewell*, 383 U.S. 116, 120 (1966); *United States* v. *Marion, supra*, 322. But the record in this proceeding contains several ingredients that can contribute to the development of the due process standards adverted to in the *Marion* opinion:

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[4] The applicable statute of limitations, 18 U.S.C. § 3282, was amended in 1954 to increase the limitations period from three years to five years. Act of Sept. 1, 1954, 68 Stat. 1145. Thus the indictment here would have been barred under the earlier three-year limitations period. See *United States* v. *Anzalone*, 197 F 2d 714, 715 (3rd Cir. 1952).

(1) No explanation has been offered by the Government for the inordinate delay of nearly five years in bringing an indictment for an offense that should and could have been quickly detected.[5] Indeed, the gap between the making of the false representation (June 7, 1967) and the start of the trial (January 30, 1973) was nearly five years and eight months. Such a delay in charging and trying an alien for such a stale offense bears the marks of prosecutorial negligence, and perhaps indicates that the bringing of the indictment was at least a prosecutorial afterthought if not a subterfuge for prosecuting an alien thought to be undesirable for other non-indictable reasons.

(2) The lengthy delay by the Government would appear to have created substantial and inevitable prejudice to petitioner's capacity to prepare and present a defense premised upon his difficulties with the English language at the time of the critical F.B.I. interview in June of 1967. While petitioner had been resident in the United States for over a decade preceeding that interview, his claim was that by 1967 his ability to communicate intelligently in English had still not been achieved. And during that 1967 interview, he may have misinterpreted the F.B.I. agent's questions, or he may have been misinterpreted by the agent.

Thus it was essential that the jury be given the most definitive means of ascertaining petitioner's

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[5] The Government actually became aware of the falsity of the representation about six months to a year following the June 1967 interview. In any event, naturalization records are at all times within the possession and control of the Government and could have been checked at any time to discover if petitioner had in fact become a naturalized citizen.

fluency, or lack thereof, in the English language as of June of 1967. And the most definitive means was for the jury to hear him speak on the witness stand, as he did in the trial below, at a time as close to June of 1967 as the interests of prompt prosecution will allow. The longer the delay between the 1967 interview and the time of trial, the more difficult it became for petitioner to attempt to reconstruct his 1967 language difficulties and the less likely it became that the jury could render a trustworthy assessment of those 1967 difficulties. By 1973, in other words, petitioner's articulation of the English language may have so improved that the jury would find incredible any defense based on a vastly different language facility five years ago.

The question remains whether the bringing of the indictment and the start of the trial some five years after a particular point in an alien's language development constitute prejudice of a most substantial and inherent nature. Petitioner's increasing facility with the language over those five years may well be in direct proportion to the decline in petitioner's due process right to present his most effective defense.

The English language problem is one that confronts many aliens, English often being described as the most difficult of all languages to acquire. When aliens are accused of crimes that turn solely on their understanding and use of that language, prompt prosecution may be essential to enable a judge or jury to make a trustworthy assessment of their language facility at the critical point in time. Perhaps no other type of crime or defense requires so prompt an assessment. It is in that context that certiorari becomes appropriate to explore the due process con-

tours of a pre-indictment and pre-trial delay in prosecuting a charge under 18 U.S.C. § 911.

2. An important question is raised under Rule 33 as to the standard to be applied in assessing newly discovered evidence submitted in support of the motion for a new trial.

In submitting his motion for a new trial on grounds of newly discovered evidence, petitioner was not guided by any definitive standard emanating from this Court for assessing such a new trial motion. And in the summary rejection of the motion in the proceedings below, the courts were likewise acting without definitive guidance from this Court. The time has now arrived for that guidance to be supplied.

It has generally been assumed that a motion under Rule 33, Federal Rules of Criminal Procedure, in order to secure a new trial on the basis of newly discovered evidence, must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal or different result; and (4) that the failure to learn of the evidence was due to no lack of diligence on the defendant's part. See Wright, Federal Practice and Procedure, Vol. 2, § 557, p. 515 (1969). The lower federal courts have generally followed those criteria, as presumably did the courts below in this case.

But this Court has refrained from sanctioning or approving those criteria, particularly that part which requires that the new evidence probably produce an acquittal or a different result. Thus in *United States* v. *Johnson*, 327 U.S. 106, 111, n. 5 (1946), with express reference to those criteria, the Court found

that it "need not consider what criteria should have guided the court in passing on the [new trial] motion." A similar reservation as to those criteria is found in *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956).

At the same time, but without specific reference to the criteria established by the lower courts, this Court in *Griffin* v. *United States*, 336 U.S. 704, 708-709 (1949), seemingly created a criterion for testing a new trial motion which is totally inconsistent with any requirement that the newly discovered evidence "probably produce an acquittal." The Court there remanded the case to the lower court to consider

> . . . whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.

It should be noted that this formulation of the criterion was made despite the Government's reliance in that case on the lower court rule that the evidence must be such as would probably produce an acquittal or a different verdict. Brief for the United States, p. 20, No. 417, Oct. Term 1948.

Thus the basic unanswered question in the instant case is whether the newly discovered evidence submitted by petitioner should be judged by one of the two following criteria: (1) would that evidence, if submitted to the jury, probably have produced an acquittal or a different result? or (2) would it be "too dogmatic" to conclude "that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before

it"? It would seem obvious that the first criterion requires a much higher standard of proof by the defendant and a much higher degree of speculation by the court than is true of the second or *Griffin* criterion.

One or the other of those criteria must be applied to the evidence submitted by the petitioner in this case, evidence which showed:

(1) After trial, petitioner discovered a witness who had overheard the critical F.B.I. interview in June of 1967. This witness had never advised petitioner that he had overheard the conversation until after petitioner's trial and conviction. And the witness' version of what he overheard differed greatly from the F.B.I. agent's version, in that the witness heard the agent ask only three simple questions (name, address and job but not citizenship) and in that the witness heard petitioner's difficulty in understanding those questions and making responses thereto. See *Amos* v. *United States*, 218 F.2d 44 (D.C. Cir. 1954), granting a new trial where "a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself."

(2) After trial and after the Government's denial that any such tapes existed, petitioner's counsel discovered tapes of immigration hearings held soon after the F.B.I. interview in 1967, a hearing which clearly revealed petitioner's language difficulties at that critical period. See *Brady* v. *Maryland*, 373 U.S. 83, 104 (1963); *Barbee* v. *Warden*, 331 F.2d 842, 847 (4th Cir. 1964), holding that where the contents of a written report have been withheld "One cannot

possibly say with confidence that such a defect in the trial was harmless."

These, then, are the elements present in this record relevant to a definitive articulation of the Rule 33 standard for obtaining a new trial on the basis of newly discovered evidence. The problems involved in evaluating Rule 33 motions are plainly important and recurring. They deserve prompt consideration by this Court.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted and the judgment below reviewed.

Respectfully submitted,

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November 23, 1973

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and seventy-three.

Present: HON. LEONARD P. MOORE
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges,

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

JOSEPH GAMBINO, *Defendant-Appellant.*

73-1916

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

BY VINCENT A. CARLIN
Chief Deputy Clerk